No. 10-1417

In The
Supreme Court of the United States

FEIN, SUCH, KAHN & SHEPARD, P.C.,

Petitioner,

v.

DOROTHY RHUE ALLEN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REASONS FOR GRANTING THE WRIT

Respondent Dorothy Rhue Allen's ("Respondent") brief fails to distinguish the Third Circuit decision from the acknowledged conflict among federal appellate courts concerning whether a communication to a debtor's attorney is actionable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA" or "Act"). Namely, Respondent contends that the Third Circuit did not address the question presented by Petitioner Fein, Such, Kahn & Shepard, P.C. ("FSKS") and that Respondent's interpretation of §1692f(1) is correct. Respondent's contention is both myopic and fundamentally misplaced because:

(1) Each of the four circuit decisions identified by FSKS in support of the Petition address and treat differently the threshold question of whether communications directed solely to a debtor's attorney are actionable at all under the FDCPA. Only after making that determination do the relevant circuit courts address the specific claims before them. Therefore, despite Respondent's after-the-fact attempts to limit her claims, she cannot genuinely deny that there is a deeply entrenched circuit split on this significant and threshold question of law that is outcome determinative in this case;

(2) Respondent urges an interpretation of §1692f(1) that conflicts with the structure and application of similar provisions in the Act. Respondent argues that

the conduct addressed in §1692f(1) is proscribed regardless of the debt collector's intent or method. However, courts have held that the intent and method are critical in analyzing similarly structured sections of the FDCPA; and

(3) Respondent readily concedes that the "Third Circuit's view about when a communication is an attempt to collect under §1692f(1) is informed and limited by §1692a(2)'s definition of communication, which includes indirect communications." Br. in Opp., 15. Stated plainly, whether a communication to a debtor's attorney is merely an indirect communication to the debtor, or instead, a communication that falls outside of the statutory protections of the Act is the exact issue on which federal courts are deeply divided. Therefore, Respondent's advocacy on the merits of the Third Circuit's decision actually highlights and further buttresses the reasons for granting this writ.

I. Respondent Fails to Recognize that Federal Courts are Deeply Divided Over the Treatment of Communications Directed to Debtors' Attorneys Under the Act.

Respondent argues that the Third Circuit limited its discussion of law and its holding to §1692f(1) and therefore the holdings of the Ninth and Seventh Circuits are irrelevant because those courts did not

deal with that particular subsection. Further, Respondent asserts that if those circuits were presented with a claim such as Respondent's "they would reach the same outcome as the decision below." Br. in Opp., 1. Respondent's self-serving conclusion does not reflect the actual holdings of the decisions at issue. Namely, the Third, Fourth, Seventh and Ninth Circuits each addressed the primary question of whether communications directed solely to a debtor's attorney are actionable under the FDCPA and then applied their view as to that threshold issue to the specific facts and statutory subsections presented by each case.

A. Contrary to Respondent's Assertion, the Third Circuit Addressed Whether Communications to a Debtor's Attorney are Actionable Under the FDCPA.

The Third Circuit's discussion of law and findings were not limited to §1692f(1). Consistent with how each other circuit court has addressed the question presented, the Third Circuit first undertook a general discussion of the FDCPA including the legislative purposes behind the Act, whether attorneys were among the class of persons regulated by the FDCPA, the application and requirements of multiple sections of the Act and the definitions of a "consumer" and "communication" within the FDCPA. *Allen v. LaSalle Bank, N.A.,* 629 F.3d 364, 367-68 (3d Cir.

2011); App. 7-9. After noting that Respondent had limited her claim to §1692f(1),[1] the Third Circuit held:

> The FDCPA similarly defines a "communication" expansively. A communication to a consumer's attorney is undoubtedly an indirect communication to the consumer . . . If an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability.

Allen, 629 F.3d at 368; App. 9-10 (*citing Evory v. RJM Acquisitions LLC,* 505 F.3d 769, 773 (7th Cir. 2007) and *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232-33 (4th Cir. 2007)). Thus, the Third Circuit's decision expressly addressed the question presented by FSKS as part of its assessment of Respondent's claim under §1692f(1) and based its ultimate decision on its determination that a communication to a debtor's attorney is an "indirect communication" to the debtor. *Id*.

Other federal courts have similarly read the Third Circuit's holding to apply broadly beyond §1692f(1). For example, in *Panto v. Professional Bureau of Collections*, 2011 U.S. Dist. LEXIS 23328

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[1] Section 1692f(1) is limited to the actual collection of prohibited amounts. However, the Third Circuit unduly extended the scope of that section to include *attempts* to collect amounts not authorized by law or agreement. *Allen,* 629 F.3d at 367, n.4; App. 8.

at *19-21 (D.N.J. March 7, 2011) the District of New Jersey, citing the Third Circuit decision in *Allen*, held:

> Although the Third Circuit decided *Allen* under *§ 1692f(1)*, that court's reasoning applies with the same force to Plaintiff's claim under *§ 1692g(b)*, because the definition of "communication" found in *§ 1692a(2)* is applicable to both *§§ 1692g(b)* and *1692f(1)*. In light of *Allen*, the Court concludes that a communication by the debt collector to the consumer's attorney is actionable under the FDCPA. . . .

Panto, 2011 U.S. Dist. LEXIS 23328 at *21. Similarly, the District Court of Minnesota in *Hemmingsmen v. Messerli & Kramer, P.A.*, 2011 U.S. Dist. LEXIS 11864, at *7-8 (D.Minn. February 7, 2011) cited to the Third Circuit decision noting that "the courts of appeals are divided on whether communications with a debtor's attorney are actionable under the FDCPA, and the Eighth Circuit has not decided this precise issue." Thus, subsequent courts considering the question presented have interpreted and applied the Third Circuit's decision in *Allen* broadly and in a manner contrary to what Respondent now urges.

B. The Seventh Circuit Addressed the Question Presented.

Respondent mischaracterizes the holding of the Seventh Circuit in *Evory* as not in conflict with the Third Circuit ruling and inaccurately claims that it supports the decision below. The language, structure

and findings in *Evory* undermine Respondent's present assertions.

The *Evory* court first noted that its decision addressed nine FDCPA questions "which have engendered considerable controversy at the circuit level and even some circuit splits." *Evory*, 505 F.3d at 771. The Seventh Circuit then confirmed that one of the issues it addressed was "[w]hether communications to lawyers are subject to sections 1692d through 1692f, which forbid harassing, deceptive and unfair practices in debt collection." *Id*. at 772 (*citing Sayyed*, 485 F.3d 226; *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007); and *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002)). The *Evory* court held:

> It is true that a lawyer is less likely to be deceived, intimidated, harassed, and so forth than a consumer. . . . But that is an argument not for immunizing practices forbidden by the statute when they are directed against a consumer's lawyer, but rather for recognizing that the standard for determining whether particular conduct violates the statute is different when the conduct is aimed at a lawyer than when it is aimed at a consumer.

Id. at 774. Accordingly, like the Third Circuit decision, the Seventh Circuit addressed the specific statutory provisions at issue within the four separate claims on appeal, including claims brought pursuant to §1692f, only after resolving the threshold issue of

whether communications with a debtor's attorney are actionable under the FDCPA.

C. The Ninth Circuit Addressed the Question Presented.

Similarly, the decision of the Ninth Circuit in *Guerrero v. RJM Acquisitions LLC,* 499 F.3d 926 (9th Cir. 2007) first addressed the threshold question of whether communications with a debtor's attorney are actionable under the FDCPA before concluding that the debtor could not establish any claims against the debt collector. As an initial premise, the Ninth Circuit rejected the assertion that the least sophisticated consumer standard, which is context-sensitive, is limited to claims arising under §1692g and §1692e(5). *Guerrero*, 499 F.3d at 934 (internal citation omitted). The *Guerrero* court confirmed that "the Ninth Circuit had applied the standard to other sections as well" citing to, among others, §1692f, thereby confirming that the method and intent of a debt collector's actions were relevant to the corresponding analysis. *Id*.

The *Guerrero* court then turned directly to the question presented and explained:

> A consumer and his attorney are not one and the same for purposes of the Act. They are legally distinct entities, and the Act consequently treats them as such. . . . Notably absent from [the] list of relatives and

> fiduciaries sharing in the common identity 'consumer' is a consumer's attorney.

Guerrero, 499 F.3d at 935. Having recognized "that Congress viewed attorneys as intermediaries able to bear the brunt of overreaching debt collection practices from which debtors and their loved ones should be protected," the court held that "communications directed solely to a debtor's attorney are not actionable under the Act" and when a debt collector "communicates exclusively with an attorney hired to represent the debtor in the matter, the Act's strictures no longer apply to those communications." *Id*. at 935-36, 939. At no point does *Guerrero* limit its application to provisions other than §1692f(1) as suggested by Respondent.

D. The Fourth Circuit Addressed the Question Presented.

The Fourth Circuit holding in *Sayyed* does not support Respondent's self-serving assertions concerning the applicable circuit court decisions. *Sayyed* held, generally, that a communication to a debtor's attorney is actionable under the FDCPA. *Sayyed*, 485 F.3d at 232-33. Just like the other circuit courts addressing this issue, *Sayyed* conducted a general analysis of the FDCPA and its definitions of "communication" and "consumer" before reaching a determination as to the question presented. *Id*. Contrary to Respondent's implication, after concluding that communications to a debtor's attorney were actionable under the Act and that no common law litigation

immunity applied to FDCPA claims, the Fourth Circuit refused to address the specific application of §1692f(1): "Now that it is clear that no such immunity exists, the application of the specific FDCPA provisions may be thoroughly addressed below. . . . For these reasons, we express no opinion on these issues and remand for further consideration." *Sayyed*, 485 F.3d at 236, n.2.

Accordingly, Respondent's assertion that there is no conflict among the federal court rulings at issue is not borne out by a detailed and comprehensive reading of the actual decisions.

II. Respondent's Interpretation of the Third Circuit Ruling Conflicts with the Structure of the Act.

At page thirteen of her Brief in Opposition Respondent suggests, incorrectly, that §1692f(1) should be applied without respect to the context in which an alleged violation occurs. As a preliminary issue, if there was no need for the Third Circuit to evaluate the circumstances in which alleged claims under §1692f(1) occurred, it follows that there would have been no need for the Court to discuss or address the threshold question of whether a communication to a consumer's attorney was actionable under the Act. Moreover, a disregard for the context of an alleged violation conflicts with the structure and application of the Act in general. Section 1692d provides that "a debt collector may not engage in any conduct the

natural consequence of which is to harass, oppress or abuse" and §1692e states that "a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Both sections then provide a list of non-exclusive acts that constitute violations of the respective sections. This is the same structure as §1692f(1). Applying Respondent's reasoning concerning §1692f(1) claims to §1692d and §1692e claims would suggest that those sections should be similarly applied without respect for the context in which the alleged conduct of the debt collector occurred.

For example, §1692e(11), in addition to setting forth disclosure requirements for initial communications with debtors, requires debt collectors to disclose that any communications are from a debt collector. Much like §1692f(1), there is no express language within §1692e(11) that speaks directly to confusion or deception. Thus, applying Respondent's logic, it would follow that courts would find a violation of §1692e(11) to exist whenever a debt collector failed to disclose the required information without consideration of the debtor collector's intent and method or the identity of the recipient. A review of court decisions involving §§1692d, 1692e and 1692f repudiates Respondent's assertion. *See Dikeman v. Nat'l Educators, Inc.*, 81 F.3d 949, 951 (10th Cir. 1996); *see also, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1200-01 (11th Cir. 2010) (noting that determination of whether conduct is unfair under §1692f requires consideration of the circumstances in which the violation occurred);

Jeter v. Credit Bureau, 760 F.2d 1168, 1179 (11th Cir. 1985) (applying §1692d); *Zaborac v. Phillips and Cohen Associates, Ltd.,* 330 F.Supp.2d 962 (E.D. Ill. 2004) (applying §1692e(3)).

The Tenth Circuit in *Dikeman*, 81 F.3d at 951, dealt with this exact issue and rejected the logic advanced by Respondent. There, the debt collector contacted an attorney for two debtors but failed to indicate that the communication was from a debt collector. The Tenth Circuit held that the failure to provide the disclosure in a communication to the debtor's attorney did not violate §1692e(11): "the fact of the debt verification and its content, *viewed in context*, was adequate to disclose to an attorney hired to represent the debtor that the debt collector was attempting to collect a debt and that any information obtained would be used for that purpose." *Dikeman*, 81 F.3d at 954 (emphasis added). The Tenth Circuit further added that "the fact that a communication is made to collect a debt is something that the lawyer's professional expertise would allow him or her to discern easily on facts such as these." *Id*. at 953. Thus, although there is no express language within §1692e(11) that speaks directly to confusion or deception, the Tenth Circuit has acknowledged that the context within which the alleged violation occurred was nonetheless relevant and appropriate to consider notwithstanding the specific language of the applicable FDCPA subsection. *Id*. It therefore follows that the context in which an alleged violation of §1692f(1)

occurred must also be considered when addressing claims under that section of the FDCPA.

III. Respondent's Interpretation of §1692f(1) Highlights the Need to Resolve the Present Circuit Split.

Focusing on the definition of unfair practices that appears in §1692f(1), Respondent reads that subsection in isolation. Respondent clarifies that, in her view, it is the inclusion of the term "attempt to collect a debt" that renders §1692f(1) unique. Br. in Opp., 15. Specifically, because any communication to an attorney would be an "attempt to collect a debt," Respondent asserts that §1692f(1) stands apart from the rest of the Act and applies regardless of to whom the unfair practice is directed. Br. in Opp., 13.

The problem with this assertion is two-fold. First, it ignores the commonly accepted precept that statutory construction is a holistic endeavor and statutory terms should not be read in isolation. *See United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). If §1692c of the FDCPA recognizes a distinction between lawyers and their debtor clients, then absent clear evidence of Congressional intent to the contrary this distinction should apply to all other similar practices under the Act. *See Zaborac*, 330 F.Supp.2d at 962, 967 (§1692c(d)'s expansion of the definition of consumer without including a consumer's attorney buttresses the conclusion that "[a]ny expansion of that definition to

encompass a consumer's lawyer would impermissibly flout the congressional definition.").

More importantly, if courts disregard to whom a communication is directed, even when there is an alleged attempt to collect unauthorized fees, then conduct that bears no reasonable relation to the purposes of the Act would categorically fall within §1692f(1)'s purview. *Cf. O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011) (FDCPA not applicable to communications issued to Court). Potentially, communications to persons who bear no acknowledged association to the statutory class sought to be protected would still be actionable. Respondent, recognizing that such a reading would impermissibly expand §1692f(1)'s reach well beyond the intended purposes of the Act [see §1692(e)], states:

> The Third Circuit's view about when a communication is an attempt to collect under 1692f(1) is informed and limited by 1692a(2)'s definition of communication, which includes indirect communications. Under this approach, only communications directly to the consumer or indirectly to persons, such as the consumer's attorney, who stand in the consumer's shoes are actionable (internal citations and quotations omitted).

Br. in Opp., 15. This is, however, exactly the issue on which this Court's intervention is needed.

The Third and Fourth Circuits rely upon the indirect communication provision in §1692a(2) to hold

that an attorney is no different than a debtor and that by communicating with a debtor's attorney a debt collector has merely indirectly communicated with the debtor. In contrast, the Seventh and Ninth Circuits recognize that an attorney stands as an intermediary between the debt collector and the debtor, and differentiate, albeit to different degrees, between a communication directed to a debtor and a communication directed to a presumptively competent and skilled attorney. *See Guerrero,* 499 F.3d at 938. Therefore, if Respondent is correct and the "attempt to collect" provision of §1692f(1) is "informed and limited by §1692a(2)'s definition of communication," then *a fortiori* the present conflict between the circuit courts regarding whether a communication from a debt collector to a debtor's attorney is actionable under the FDCPA should be resolved.

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CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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